Syed Mudzaffar bin Syed Zainul Abidin v Kenanga Investment Bank Bhd and another appeal

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCC-7–01 OF 2021 AND WA-12ANCC-8–01 OF 2021
WAN MUHAMMAD AMIN JC
20 OCTOBER 2021

Civil Procedure — Striking out — Counterclaim — Appellant's counterclaim premised on allegations of negligence — Whether respondent was negligent — Whether appellant acted on own accord in overselling — Whether counterclaim disclosed reasonable cause of action — Whether sessions court judge had erred in allowing striking out application — Rules of Court 2012 O 18 r 19

Civil Procedure — Summary judgment — Appeal against judgment in favour of plaintiff — Whether appellant bound by respondent's terms and conditions — Whether respondent had right to sell shares — Whether respondent had right to impose late payment interest — Whether appellant had raised triable issue — Whether initiation of third party proceedings amounted to triable issue — Whether sessions court judge had erred in allowing summary judgment application — Rules of Court 2012 O 14

This was an appeal against two decisions of the sessions court on 24 December 2020 whereby the sessions court had: (a) allowed the respondent's (plaintiff in the sessions court) application for summary judgment under O 14 of the Rules of Court 2012 ('the ROC') ('respondent's O 14 application') ('Appeal 7'); and (b) allowed the respondent's application to strike out the appellant's counterclaim under O 18 r 19(1)(a) or (1)(b) or (1)(d) of the ROC (respondent's O 18 application) ('Appeal 8'). The appellant opened an individual trading account on 7 May 2009 with ECM Libra Investment Bank which was subsequently acquired by the respondent. The trading shares on the respondent's platform was subject to the terms and conditions and the appellant's Central Depository System ('CDS') account was subject to the provisions of Bursa Malaysia Depository Sdn Bhd. The appellant had then purchased ICON Offshore Bhd shares under the appellant's trading account in several transactions between 8 June 2018 to 8 January 2020 but following the trades conducted by the appellant on the ICON Shares, the appellant incurred contra losses. The respondent issued two reminders to the appellant to pay the outstanding amount in the appellant's trading account consequent to the contra losses. As the appellant failed, refused and/or neglected to make payments towards the outstanding amount in the appellant's trading account, the respondent issued a letter of demand to claim for the outstanding amount

of RM630,025.31 as at 4 May 2020 from the appellant. The respondent's claim against the appellant was essentially for contra losses and other sums arising therefrom. The appellant denied that there was any agreement in respect of the terms and conditions and in any event, contended that the terms and conditions were lopsided. The appellant further counterclaimed against the respondent alleging gross negligence by the respondent. The issues before the court were: (i) whether the appellant was bound by the respondent's terms and conditions; (ii) whether the respondent was negligent; (iii) whether the respondent had a right to sell the shares in the appellant's trading account and to impose late payment interest; and (iv) whether the third party notice issued was tantamount to a triable issue.

Held, dismissing the appeals with costs:

(1) The court found no merits in the appellant's argument that he had no knowledge or was not bound by the respondent's terms and conditions. Having signed the respondent's accounting opening form, the appellant was bound by its terms and conditions made thereafter, notwithstanding whether the appellant had read those terms or not. The appellant's acceptance of the 2 August 2019 terms and conditions could also be inferred from his conduct (see paras 21, 23 & 26).

(2) Whilst the subsequent events after the first overselling were immaterial, they nevertheless showed that the appellant was acting and continued to act on his own with regards to the ICON shares. Therefore, the appellant could not be allowed to now assign blame to the respondent for his own acts. Further to that, more than sufficient notice was given to the appellant regarding the ICON shares consolidation and he ought to have known about it even before the first overselling took place on 22 January 2020, well before Bursa Malaysia's announcement on its website and also on the respondent's Kentrade platform (see paras 39–40 & 44).

(3) As the appellant had failed to make payment to the respondent for the outstanding amount in the appellant's trading account, the respondent was entitled to sell the shares therein and applied the net proceeds of the sale to settle all monies owed to the respondent. This was expressly provided for under cl 23.2.3 of the 2 August 2019 terms and conditions. Similarly, the respondent's right to impose late payment interest as well as legal charges were provided for in the 2 August 2019 terms and conditions, specifically cll 30.2 and 30.3. Even in the absence of the abovementioned clauses, the law allows for interest and costs to be imposed on debts owed or outstanding sums. They do not by themselves constitute triable issues (see paras 65–67).

(4) It is trite law that third party proceedings are regarded as separate and independent proceedings. Therefore, the third party proceedings could

be separated from the appellant's counterclaim as well as the respondent's claim and did not necessarily mean there was a triable issue (see paras 69–70).

(5) The appellant had failed to satisfy the court why judgment should not be entered against him or that there was a triable issue, or that there ought for some other reason to be a trial. It follows that the counterclaim, which was also premised on negligence, was bound to fail as it failed to disclose a reasonable cause of action or was frivolous, vexatious or otherwise an abuse of the process of court. The counterclaim was on the face of it is obviously unsustainable. Therefore, the learned sessions court judge had not erred in allowing the respondent's O 14 and O 18 application (see paras 73–75).

[Bahasa Malaysia summary

Ini merupakan rayuan-rayuan terhadap dua keputusan mahkamah sesyen pada 24 Disember 2020 di mana mahkamah sesyen telah: (a) membenarkan permohonan responden (plaintif di dalam mahkamah sesyen) untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') ('pemohonan Aturan 14 responden') ('Rayuan 7'); dan (b) membenarkan permohonan responden untuk membatalkan tuntutan balas perayu di bawah A 18 k 19(a) atau (b) atau (d) KKM (pemohonan A 18 responden) ('Rayuan 8'). Perayu membuka akaun perdagangan individu pada 7 Mei 2009 dengan ECM Libra Investment Bank yang selepas itu dimiliki oleh responden. Saham perdagangan pada platform responden tersebut adalah tertakluk kepada terma-terma dan syarat-syarat dan akaun Central Depository System ('CDS') perayu adalah tertakluk kepada peruntukan Bursa Malaysia Depository Sdn Bhd. Perayu seterusnya membeli saham ICON Offshore Bhd di bawah akaun perdagangan perayu dalam beberapa transaksi antara 8 Jun 2018 ke 8 Januari 2020 tetapi mengikut perdagangan yang telah dijalankan oleh perayu pada saham ICON, perayu menanggung kerugian kontra. Responden mengeluarkan dua peringatan kepada perayu untuk membayar jumlah tertunggak di dalam akaun perdagangan perayu akibat daripada kerugian kontra. Memandangkan perayu gagal, enggan dan/atau abai untuk membuat bayaran kepada jumlah tertunggak di dalam akaun perdagangan perayu, responden mengeluarkan surat tuntutan untuk jumlah tertunggak sebanyak RM630,025.31 pada 4 Mei 2020 daripada perayu. Tuntutan responden kepada perayu adalah utamanya berkaitan dengan kerugian kontra dan jumlah-jumlah lain yang timbul. Perayu menafikan bahawa terdapat apa-apa perjanjian berkaitan dengan terma-terma dan syarat-syarat dan dalam sebarang keadaan, menyatakan bahawa terma-terma dan syarat-syarat tersebut adalah tersongsang. Perayu selanjutnya membuat tuntutan balas terhadap responden mengatakan mengenai kecuaian terus oleh responden. Isu-isu di mahkamah adalah: (i) sama ada perayu adalah terikat dengan terma-terma dan syarat-syarat responden; (ii) sama ada responden telah cuai; (iii) sama ada

responden mempunyai hak untuk menjual saham di dalam akaun perdagangan perayu dan untuk mengenakan faedah bayaran lewat; dan (iv) sama ada notis pihak ketiga yang dikeluarkan merupakan satu isu yang boleh dibicarakan.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Mahkamah mendapati bahawa tiada merit di dalam hujahan perayu bahawa beliau tidak mempunyai pengetahuan atau tidak mengikut terma-terma dan syarat-syarat responden. Setelah menandatangani borang pembukaan akaun responden, perayu adalah terikat dengan terma-terma dan syarat-syarat ke atasnya, meskipun perayu telah membaca terma-termanya atau tidak. Penerimaan perayu pada 2 Ogos 2019 atas terma-terma dan syarat-syarat boleh juga dilihat melalui tingkah laku (lihat perenggan-perenggan paras 21, 23 & 26).

(2) Walaupun peristiwa-peristiwa selepas penjualan lebih yang pertama adalah tidak material, ia walau bagaimanapun menunjukkan bahawa perayu telah bertindak dan terus bertindak atas kemahuannya sendiri berkenaan dengan saham ICON. Oleh itu, perayu tidak boleh dibenarkan untuk menyalahkan responden atas tindakannya sendiri. Selanjutnya, lebih dari notis yang cukup telah diberikan kepada perayu berkenaan dengan pengabungan saham-saham ICON dan beliau sepatutnya tahu mengenainya walaupun sebelum penjualan lebih pertama mengambil tempat pada 22 Januari 2020, sebelum pengunguman Bursa Malaysia di laman sesawangnya dan juga di platform Kentrade milik responden (lihat perenggan 39–40 & 44).

(3) Memandangkan perayu telah gagal membuat bayaran kepada responden untuk jumlah tertunggak di dalam akaun perdagangan perayu, responden berhak untuk menjual saham-saham di dalamnya dan hasil bersih jualan untuk melunaskan semua wang yang terhutang kepada responden. Ini telah diperuntukkan di bawah klausa 23.2.3 untuk terma-terma dan syarat-syarat pada 2 Ogos 2019 terms and conditions. Pada masa yang sama, hak responden untuk mengenakan faedah pembayaran lewat dan juga kos undang-undang diperuntukkan di dalam terma-terma dan syarat-syarat di dalam 2 Ogos 2019, secara khususnya klausa 30.2 dan 30.3. Walaupun dalam ketiadaan klausa-klausa yang dinyatakan di atas, undang-undang membenarkan untuk faedah dan kos-kos untuk dikenakan pada hutang yang tertunggak dan jumlah tertunggak. Ia tidak menjurus kepada isu-isu yang perlu dibicarakan (lihat perenggan 65–67).

(4) Ia adalah undang-undang mantap bahawa prosiding pihak ketiga dianggap sebagai berasingan dan prosiding yang berdikari. Oleh itu, prosiding pihak ketiga boleh dipisahkan daripada tuntutan balas perayu dan juga tuntutan responden dan tidak menjurus kepada isu yang perlu

dibicarakan (lihat perenggan 69–70).

(5) Perayu telah gagal menyakinkan mahkamah sebab penghakiman tidak boleh dimasukkan terhadapnya atau bahawa terdapat isu yang dibicarakan, atau bahawa ada sebab lain untuk perbicaraan. Ia juga terdapat dalam tuntutan balas, yang mana juga berasaskan pada kecuaian, akan gagal kerana ia gagal menunjukkan kausa tindakan yang munasabah atau remeh, menyusahkan atau merupakan penyalahgunaan proses mahkamah. Tuntutan balas jelasnya tidak boleh diteruskan. Oleh itu, hakim mahkamah sesyen yang terpelajar tidak terkhilaf dalam membenarkan permohonan A 14 dan A 18 responden (lihat perenggan 73–75).]

Cases referred to

Bandar Builder Sdn Bhd v United Malaysian Banking Corp Bhd [1993] 3 MLJ 36, SC (refd)
Enco Systems Sdn Bhd v Soon Hin Hardware [2009] 9 MLJ 535, HC (refd)
Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors [2020] 6 MLJ 703, CA (refd)
Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd [1994] 2 MLJ 353, HC (refd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425, CA (refd)

Legislation referred to

Rules of Court 2012 O 14, O 18 rr 19(1)(a), (1)(b), (1)(d)

Yusman bin Mohd Badar (Muhammad Nazmi bin Hanafi with him) (Chambers of Yusman Azlin Anwar) for the appellant.
Tiang Wen En (Skrine) for the respondent.

Wan Muhammad Amin JC:

[1] This judgment is in respect of the appellant's (defendant in the sessions court) appeals against two decisions of the sessions court on 24 December 2020:

(a) allowing the respondent's (plaintiff in the sessions court) application for summary judgment under O 14 of the Rules of Court 2012 ('the ROC')

against the respondent ('respondent's O 14 application') ('Appeal 7'); and

(b) allowing the respondent's application to strike out the appellant's counterclaim dated 25 September 2020 under O 18 r 19(1)(a) or (1)(b) or (1)(d) of the ROC against the respondent ('respondent's O 18 application') ('Appeal 8').

('the Appeals')

[2] Following an application by the appellant to consolidate Appeal 7 and Appeal 8, I had on 15 February 2021 ordered that both the appeals be heard together.

BACKGROUND

The respondent's claim

[3] The appellant had on or about 7 May 2009 opened an individual trading account with ECM Libra Investment Bank which was subsequently acquired by the respondent. The appellant's customer code is SY0502180 and the appellant's Central Depository System ('CDS') account number is 049014749 ('appellant's trading account').

[4] The trading of shares on the respondent's platform is subject to the respondent's terms and conditions and the appellant's CDS account is subject to the provisions of Bursa Malaysia Depository Sdn Bhd.

[5] The respondent had issued a letter dated 1 April 2013 ('respondent's 1 April 2013 letter') to the appellant to notify him of new terms and conditions in relation to the appellant's trading account which were applicable from 1 May 2013 ('1 April 2013 terms and conditions'). The 1 April 2013 terms and conditions which were enclosed with the respondent's 1 April 2013 letter were superseded by the terms and conditions dated 2 August 2019 ('2 August 2019 terms and conditions'). Amongst others, the salient terms of the 2 August 2019 terms and conditions are as follows:

> 2.1 The Form and the Terms shall form an integral part of the contractual relationship between the Client and the Bank. The Bank's provision of Services to the Client *shall be subject to the Terms, the contents in the Form and the website terms as well as any additional terms and conditions introduced by the Bank at its own discretion from time to time*, including but not limited to terms and conditions on pledged Securities. *The website terms shall be read together with and as part of the Terms and the Form*.
>
> 2.2 *Utilisation by the Client of any of the facilities and/or Services* provided by the Bank shall be *deemed as acceptance of the Terms regardless of whether the Client executes the*

Form. The provisions and contents in the Form shall continue to apply and subsist notwithstanding the cessation of use of any facilities or Services by the Client.

...

5.1 The *Client* hereby *irrevocably and unconditionally authorises the Bank*, to the extent permitted by law, to carry out any of the following:

5.1.1 debit any of the Clients' Account in respect of any Indebtedness;

5.1.2 set off against any Client's Account(s) in or towards settlement of the Indebtedness or any part thereof;

5.1.3 suspend or close any of the Client's Account(s) without giving any reasons whatsoever;

5.13 Settlement by way of 'contra' to set off outstanding purchase positions against outstanding sale positions of the same Securities for 'ready basis' contracts may be allowed at the discretion of the Bank. If so allowed, *such settlement shall be further subject to the following terms*:

5.13.4 *interest is chargeable on all outstanding contra losses commencing the day after the contra loss crystallized at the prevailing interest rate calculated*. Any indulgence granted on the calculation of interest shall not constitute a waiver of the Bank's rights;

...

10.23 *Any acknowledgment, notification or statement issued or published by the Bank via the E-Services shall be deemed to have been received by the Client when the same was issued or published by the Bank and the Client shall be bound thereby* notwithstanding that such acknowledgment, notification or statement may not have actually been received by the Client for any reasons whatsoever.

...

22.5 Any demand for payment or service of any legal process may be made or effected by prepaid registered or ordinary post addressed to the Client to the address or addresses last notified in writing by the Client to the Bank or at the Client's last known address/place of business and such demand or legal process shall be deemed to have been duly served on the fifth (5th) day following that on which it was posted, notwithstanding that the said demand or legal process may subsequently be returned undelivered by the postal authorities. The Client hereby irrevocably confirms that service of such documents in the manner aforesaid shall be deemed good and sufficient service on the Client and the Client agrees to waive any right to demand personal service in respect of such writ of summons or any other originating process of the court documents.

...

23.1 Each of the following shall be an *Event of Default*, whether it is within or beyond the control of any party to the Form and/or the Terms:

23.1.2 *failure on the part of the Client to pay any sum of any kind or nature whatsoever (whether actual or contingent) due*;

23.2 If an Event of Default shall occur or be continuing, the Bank as the case *may* be shall have the *absolute discretion* to do any one or more of the following:

23.2.1 suspend and/or close any or all of the Client Account(s) and/or terminate or determine all the Services and facilities provided or any part thereof;

23.2.2 demand full payment of all Indebtedness from the Client;

23.2.3 *sell or dispose in any manner as the Bank in its sole discretion deem fit all Securities held in any of the Client Account(s) and apply the net proceeds of any sale or disposal towards settlement of all monies owing to the Bank*; and/or

23.2.4 to sell-out any outstanding purchases (which have not been paid for) and utilize any sums standing to the credit to set-off against losses, if any, arising from such said sell-out or in the event there are any proceeds from such sell-out, the Bank may apply the net proceeds of any sale or disposal towards settlement of all monies owing to the Bank.

...

30.2 The Client agrees that upon receipt of written notice from the Bank, *the Client shall pay* to the Bank *all Indebtedness and other dues payable* and/or reimburse the Bank respectively for all costs and expenses incurred by the Bank for and on the Client's behalf.

30.3 The *Client shall also pay interest on late payments at the Bank's prevailing rate on all Indebtedness*, outstanding contracts and on any debit balance in the relevant accounts from the date the amount is due until full settlement thereof. Such interest rates shall be subject to change by the Bank from time to time. The Client is advised to check the prevailing late payment interest rate with the Bank prior to incurring any Indebtedness. (Emphasis added.)

[6] The appellant had purchased ICON Offshore Bhd shares under the appellant's trading account in several transactions between 8 June 2018 to 8 January 2020 ('ICON shares').

[7] Following trades conducted by the appellant on the ICON shares on or about 22 January 2020 and 23 January 2020, contra losses were incurred by the appellant on the appellant's trading account.

[8] The respondent issued two reminders dated 31 January 2020 and 29 February 2020 respectively to the appellant to pay the outstanding amount in the appellant's trading account consequent to the contra losses.

[9] As the appellant failed, refused and/or neglected to make payments towards the outstanding amount in the appellant's trading account, the respondent issued a letter of demand dated 4 May 2020 to claim for the outstanding amount of RM630,025.31 as at 4 May 2020 from the appellant

whereby the appellant was required to pay the outstanding amount within 14 days from the date of the said letter of demand and the appellant was informed that interest will continue to accrue on the total debit balance outstanding until date of full settlement of the total outstanding balance in the appellant's trading account.

[10] The respondent's claim against the appellant is essentially for contra losses and other sums arising therefrom, the brief particulars of which are as follows:

Particulars	RM
Contra losses:	616,228.57
Less: Sale of shares	(389,788.47)
Debit Balance as at 31 July 2020	226,440.10
Add: Late Payment Interest	24,309.31
Add: Legal Fees	1,060.85
Amount Outstanding as at 31 July 2020	251,810.26

[11] Thus, the sum claimed by the respondent is for RM251,810.26 as at 31 July 2020 and interest on the sum of RM226,440.10 calculated from 1 August 2020 and costs.

The appellant's defence and counterclaim

[12] The appellant does not deny opening the appellant's trading account (though originally under ECM Libra Investment Bank Bhd) nor the trades that were conducted on the ICON shares which resulted in the contra losses.

[13] Regarding the issue of the agreement between the respondent and the appellant, the appellant raised the following defences:

(a) the appellant denies there was any agreement in respect of the 1 April 2013 terms and conditions or the 2 August 2019 terms and conditions and that in the alternative the appellant pleads that there is no document in the form of an agreement with those terms which the appellant had agreed to;

(b) the appellant has no knowledge of the issuance of the respondent's 1 April 2013 letter and its contents; and

(c) in any event the 2 August 2019 terms and conditions are lopsided.

[14] Regarding the appellant's trading account and the issue of the contra losses the appellant raised the following defences:

A (a) the appellant had relied on the services of a remisier called Shahrin bin Shaari under the employ of the respondent ('remisier') and there is a contractual responsibility or liability (*tanggungan*) between the respondent and the remisier;

B (b) the contra losses were the result of the wrong or incomplete advice of the remisier specifically regarding the consolidation of the ICON shares at the ratio of 50:1 (the consolidation of 50 shares to one share) ('ICON shares consolidation') which resulted in the appellant short selling the ICON shares;

C (c) the respondent was negligent in failing to take reasonable care including to suspend the activities on the platform under the appellant's trading account to avoid the short selling or the selling the ICON shares more than what the appellant actually owned;

D (d) the respondent was negligent in the performance of its duties which were licensed by the authorities to provide transparent, efficient and fair services including taking all efforts to avoid the short selling on the respondent's online platform called 'KenTrade' ('Kentrade');

E (e) the respondent was negligent in failing to ensure the remisier possessed the necessary information regarding the ICON shares;

(f) the respondent had caused a critical situation by opening the trading limit for the appellant to purchase the ICON shares on 22 January 2020 totalling 1,342,012 shares;

F (g) the respondent was jointly negligent with the remisier by:

(i) failing to ensure the remisier was informed of the ICON shares consolidation;

G (ii) causing the remisier to give advice to the appellant to repurchase the ICON shares totalling 1,342,012 shares; and

(h) the contra losses were caused directly or indirectly by the respondent.

H **[15]** The appellant's counterclaim against the respondent is premised primarily on the above allegations of negligence. That, further, the respondent was negligent in proving the paid platform, Kentrade, which can be operated by the appellant autonomously which is not safe and highly risky that it had caused the appellant such high losses.

I **[16]** The appellant's counterclaim against the respondent is for gross negligence (para 19 of the counterclaim) and the relief prayed for by the appellant are essentially as follows:

(a) replacement of the RM389,788.47 being the value of the appellant's shares sold by the respondent (to reduce the outstanding amount under the appellant's trading account);

(b) general and special damages (which quantum of special damages the appellant did not specify save for the above RM389,788.47);

(c) exemplary damages; and

(d) costs.

SUMMARY OF THE APPELLANT'S DEFENCE AND COUNTERCLAIM

[17] The appellant's defence and counterclaim can be summarised as follows:

(a) the appellant is not bound by the 2 August 2019 terms and conditions as there is no 'documentary' agreement between the parties; and

(b) the respondent was grossly negligent in particular for:

(i) failing to ensure that the remisier advised the appellant regarding the ICON shares consolidation and other advice relating thereto;

(ii) failing to take reasonable care including to avoid the short selling or the selling the ICON shares more than what the appellant actually owned; and

(iii) providing the respondent's online platform, Kentrade, which allowed the appellant to trade the ICON shares resulting in losses.

[18] The appellant's defence to the respondent's claim is intertwined with the appellant's counterclaim. The counterclaim is based on the allegation of negligence which is also the appellant's defence against the appellant's claim. Hence, if the appellant fails in its defence so too would his counterclaim fail.

[19] I will now deal with the issues raised by the appellant in his defence and counterclaim. The issues pertaining to the allegation of negligence and the respondent's online platform, Kentrade, can be dealt with together as the allegation concerning Kentrade is essentially that the respondent was negligent in providing the said online platform.

A WHETHER THE APPELLANT IS BOUND BY THE RESPONDENT'S TERMS AND CONDITIONS

[20] Whilst the appellant challenges the applicability of the respondent's 2 August 2019 terms and conditions and other terms and conditions, however, the appellant did not deny and in some instances expressly admitted the following:

(a) the appellant did not deny that he had on 7 May 2009 signed a form to apply for the opening of an individual account with ECM Libra Investment Bank Bhd (which was subsequently acquired by the respondent where a vesting order was granted by the High Court on 30 October 2012) 'respondent's account opening form') with, inter alia, the following terms:

> A. TERMS AND CONDITIONS OF TRADING FOR ALL TRADING, COLLATERISED, DISCRETIONARY FINANCING, MARGIN AND PREPAID ACCOUNTS.
>
> I, hereby:
>
> ...
>
> 3. *Agree that ECM shall have the right at any time and from time to time to impose such other terms and conditions in connection with my Accounts as ECM deems necessary and I undertake to comply with the said terms and conditions at all times*.
>
> I. Communications
>
> 1.1 *All communication*, notices, demand, alerts *and other documents* required to be given or supplied to me may be given to me or my dealer's representative by the authorised officers, dealer's representative or solicitor of ECM and all such communication, notices, demand or documents to me may be sent by post, hand delivery, courier, telex, cable or facsimile transmission, telephone, mobile phone, pager, electronic mail or *such other manner as ECM may in its sole and absolute* discretion deem fit, to my last known address, telex or cable ox facsimile number, telephone, mobile phone or pager number or electronic mail address in ECM's records. (Emphasis added.)

(b) at around the same time or a day earlier, the appellant had also signed an application for the opening of the CDS account ('CDS application') where the appellant had agreed to be bound by the legal provisions of Bursa Malaysia Depository Sdn Bhd;

(c) the appellant admitted that he has now read the 2 August 2019 terms and conditions on the respondent's website but finds it lopsided; and

(d) the appellant admitted to conducting trades in respect of the ICON shares using the respondent's online platform, Kentrade. Thus, in so

doing the appellant traded using his designated CDS account and the appellant's trading account with the respondent.

[21] Given the above undisputed facts I find no merits in the appellant's argument that he has no knowledge or is not bound by the respondent's terms and conditions, particularly the 2 August 2019 terms and conditions which arose originally from the respondent's account opening form.

[22] In this regard cl 3 of Part A of respondent's account opening form clearly allows the respondent to impose other terms and conditions and the respondent may communicate them to the appellant in various ways including in such other manner as the respondent deems fit pursuant to cl 1.1 of Part I.

[23] Having signed the respondent's account opening form the appellant is bound by its terms as well as the subsequent terms and conditions made thereafter, namely the 2 August 2019 terms and conditions, notwithstanding whether the appellant has read those terms or not (*Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425 (CA) at paras 35–37).

[24] The 'website terms' referred to in cl 2.1 of the 2 August 2019 terms and conditions (stated in para 5 above), means the terms and conditions posted at any of the respondent's internet websites and as may be updated by the respondent from time to time.

[25] Further, having used the respondent's online platform, Kentrade, to trade in the ICON shares, the appellant cannot now deny the 2 August 2019 terms and conditions as he is deemed to accept them upon utilising the said platform (cl 2.2 of the 2 August 2019 terms and conditions).

[26] The appellant's acceptance of the 2 August 2019 terms and conditions can also be inferred from his conduct (*Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors* [2020] 6 MLJ 703(CA), at paras 50–54).

[27] To say otherwise is akin to allowing the appellant to benefit from using the respondent's trading account but not be bound by the terms attached to it. The appellant cannot pick and choose terms which benefit him and reject those he finds unfavourable.

WHETHER THE RESPONDENT WAS NEGLIGENT

[28] On this issue, it is ironic that the appellant should be relying on cl 4.14 of the 2 August 2019 terms and conditions which is part of the terms and conditions which he claims do not apply to him.

[29] Clause 4.14 of the 2 August 2019 terms and conditions states as follows:

> 4.14 Notwithstanding that all shares, stocks and other Securities in the Client's Account(s) are registered in the Client's name, the Clients shall hold, dispose or otherwise deal with the Securities in the manners prescribed and acceptable by the Bank *and save and except for any act(s) of fraud or gross negligence*, the Bank shall not be held liable for any reasons whatsoever by reasons of prescribing such manner of disposal with the said Securities should the Client suffer or incur any losses, liabilities, damages, claims, interests, charges, expenses, costs and/or any other adverse consequences resulting from such prescription by the Bank. (Emphasis added.)

[30] In para 19 of the counterclaim the appellant alleged that the respondent was grossly negligent.

[31] In response to the appellant's allegation of negligence (including gross negligence) against the respondent in the defence and counterclaim, the respondent had raised the following main arguments:

(a) the appellant traded on the ICON shares of his own accord;

(b) the information regarding the ICON shares consolidation was in the public domain. The ICON shares consolidation was to take effect on 23 January 2020 and was announced on the Bursa Malaysia's website since 9 January 2020 and also on the respondent's Kentrade platform since 14 January 2020. Pursuant to cl 10.23 of the 2 August 2019 terms and conditions the announcement on the respondent's Kentrade platform is deemed to have been received by the appellant; and

(c) it is not the respondent's obligation to advise the appellant specifically as to which shares the appellant should sell or purchase and in this regard cls 4.16 and 10.20 of the 2 August 2019 terms and conditions are applicable.

[32] I agree and accept the respondent's arguments and will elaborate on them below.

The appellant traded on the icon shares of his own accord.

[33] The appellant himself admitted that he had sold the ICON shares and only informed the remisier of this after the said sale.

[34] This can be ascertained from paras 5(i)–(iii) of the defence which statements were elaborated in paras 12(i)–(iii) of the appellant's affidavit in reply filed in respect of respondent's O 14 application (with identical averments in the appellant's affidavit in reply filed in the respondent's O 18 application) as follows:

12. Saya dengan ini *mengakui membeli saham ICON Offshore Berhad* dan ia adalah *bagi tujuan keuntungan* ('Saham ICON') dan telah memiliki sejumlah 1,349,000 unit saham setakat *22.1.2020*, namun pada masa yang sama menyatakan bahawa;

(i) *Pada masa sebelum penjualan*, jumlah prinsipal yang boleh didagangkan *dalam akaun saya* adalah bernilai *RM121,841.00* dan atas harga seunit adalah sebanyak *RM00.089*.

(ii) Pada *22.1.2020* jam lebih kurang 9.00 pagi *saya mendapati* harga dagangan Saham ICON *melambung* sehingga ke paras *0.185 malah sehingga 0.205* dan *kemudian menjualkan* Saham IKON bagi tujuan membuat keuntungan.

(iii) *Selepas selesai menjual* Saham IKON tersebut, *saya menghantar mesej* secara aplikasi Whatsapp kepada Pihak Ketiga tersebut dan *memaklumkan akan penjualan saya dan atas kenaikan harga saham sehingga 'melambung tinggi'* yang mana beliau telah menyatakan kegembiraan atas perkhabaran tersebut dan cerita berkaitan kejayaan membuat keuntungan dari penjualan tersebut oleh saya. (Emphasis added.)

[35] What is clear from the above averments and the conclusions that can be drawn from them are that:

(a) the appellant sold the ICON shares of his *own accord*;

(b) the appellant sold the ICON shares *using Kentrade*, the respondent's online platform. The appellant did so *on his own* and had *no issue or complaint* in using the said platform. The appellant's use of the words '*dalam akaun saya*' must mean the appellant's trading account with the respondent with the 2 August 2019 terms and conditions governing its use;

(c) the appellant sold the ICON shares *independent* of any advice from the remisier (referred to as 'pihak ketiga' in the appellant's affidavit in reply) or the respondent;

(d) the appellant was *aware* and *knew* what he was doing. This can be seen also from his reason for selling the ICON shares which was to make profit when he saw that the ICON shares price had soared very high or in his own words '*melambung tinggi*';

(e) the appellant sold the ICON shares at his *own risk*. The appellant's decision was based on his *own knowledge and assessment* of the price of the ICON shares at that point of time;

(f) the appellant had *already suffered losses* in the appellant's trading account as the appellant had *oversold* the ICON shares following the ICON shares consolidation which was publicly announced and explained by Bursa Malaysia; and

(g) the appellant only *informed* the remisier of the sale of the ICON shares

after he had sold them.

[36] Given the above facts, what happened subsequent to the above sale of the ICON shares by the appellant ('first overselling') is of no real consequence as the loss had already been incurred on the appellant's trading account based on the appellant's own action. However, I have also considered the appellant's argument regarding the alleged advice given by the remisier and by extension the respondent.

[37] The following averments of the appellant are contained in the paras 5(v)–(viii) of the defence and elaborated in paras 12(iv)–(vii) of the appellant's affidavit in reply (a continuation from the averments stated in para 34 above):

> (iv) Kira-kira *jam 11.52 hari yang sama*, Pihak Ketiga tersebut telah menghubungi saya menyatakan saya mestilah membeli semula saham yang dijual dengan mesej bunyi Kena beli balik 1,342,012 unit' 'sbb 50 jadi 1' dan mengatakan kononnya saya telah 'terlebih jual' tanpa menjelaskan maksud sebenar, dan mengatakan saya tidak mempunyai wang lagi untuk membeli semula atas dasar ianya telah dijual;
>
> (v) Pihak Ketiga tersebut menyatakan bahawa bagi tujuan pembelian semula itu, Plaintif sebagai pemilik platform tersebut telah membuka had pembelian saya semata-mata baqi membolehkan saya membeli semula, walaupun tidak dipohon oleh saya langsung;
>
> (vi) atas nasihat Pihak Ketiga tersebut dan atas perlakuan Plaintif sendiri, *saya telah membeli* semula saham IKON pada jam 2.30 petang sebanyak 1,300,000 saham pada harga purata RM0.405;
>
> (vii) *Atas dasar ketiadaan langsung penjelasan oleh Pihak Ketiga* akan keadaan sebenar dan kerana ketiadaan tindakan pantas dan positif Plaintif malahan telah menyuruh dan/atau menggalakkan saya membeli semula *menyebabkan kepanikan saya yang serius atas insiden terlebih menjual saham* ('short-selling') tersebut *dan kemudiannya telah menjualkan saham-saham tersebut seperti berikut*;
>
> (a) Pada jam kira-kira *3.55 petang 22.1.2020, menjualkan* Saham ICON sebanyak 300,000 unit pada harga RM0.415;
>
> (b) Pada *23.1.2020 menjualkan* keseluruhan Saham ICON yang dipegang Plaintif berjumlah 1,000,000 unit pada harga RM0.450, RM0.455 dan RM0.56 masing-masing namun walau bagaimanapun, Pihak Ketiga tersebut telah menghubungi saya pada hari yang sama dan menasihatkan saya untuk membeli semula di mana saya telah membeli semula Saham ICON sebanyak 1,000,000 dengan harga RM0.685. (Emphasis added.)

[38] Again, the appellant's above averments are telling of his state of mind and the following can be ascertained from them:

(a) after the first overselling the appellant himself continued buying and selling the ICON shares *without* following the purported advice of the

remisier to buy back the ICON shares that the appellant had oversold from the first overselling; and

(b) the appellant was in a *state of panic* having found out of the ICON shares consolidation and the first overselling, which he did before he contacted the remisier.

[39] Therefore, whilst the above subsequent events after the first overselling are immaterial, they nevertheless show that the appellant was acting and continued to act on his own with the regards to the ICON shares.

[40] Therefore, the appellant cannot be allowed to now assign blame to the respondent for his own acts.

The icon shares consolidation was publicly announced and was on the respondent's online platform, Kentrade.

[41] The ICON shares consolidation was announced on the Bursa Malaysia's website since 9 January 2020 ('Bursa Malaysia's announcement') which announcement was quite comprehensive and, inter alia, informed the public that:

(a) on or after 22 January 2020, the shareholders of ICON Offshore Bhd can *only sell* the total amount of shares which they estimate that they will own *after* the consolidation of the said shares. The relevant portion of the Bursa Malaysia's announcement is as follows:

> (b) on the basis of settlement taking place after 23 January 2020 with consolidated ICON shares, any entitled shareholder who owns ICON shares as at Ex-date *may sell only up to the maximum ICON shares he expected to receive after the Share consolidation*, ie *the reduced amount, on or after the Ex-date 22 January 2020*. (Emphasis added.)

(b) the shareholders of ICON Offshore Bhd were given the following formula and illustration to calculate the estimate total amount of shares which they may sell on or after 22 January 2020:

> With the adjustments pursuant to the Share consolidation effected on ICON shareholders' CDS account at the end of the Entitlement Date ('Books Closure Date'), an entitled ICON shareholder may use the following *basis to estimate the maximum number of ICON shares that he may sell from the Ex-date until the Book Closing Date* which is from 22 January2020 until 23 January 2020.
>
> Number of ICON shares that may be = *Number of shares held/50 sold on 22 January 2020 until 23 January 2020* (All fractional shares computed should be disregarded)

A Illustration:

For example, if Mr X owns or purchases 5000 ICON shares on cum basis on 21 January 2020, his CDS account would still show 5000 ICON shares until 23 January 2020. However, as a results of the above Share consolidation exercise, Mr X's 5000 ICON shares in his CDS account will be adjusted to
B 100 ICON shares on the night of 23 January 2020 which is the Book Closing Date, Therefore, Mr X may, if he so wishes, sells only up to 100 ICON shares on or after the Ex-date i.e. from 22 January 2020 onwards. (Emphasis added.)

(c) the consolidated ICON Offshore Bhd shares (of 50 shares to 1 share) will only be listed and quoted on Bursa Malaysia Securities Bhd on 24 January 2020 where it was explained as follows:

Remarks 2): The Share consolidation entails the consolidation of every 50 Existing Shares into 1 Consolidated Share as at 5.00 p.m. on Thursday, 23 January 2020. *The Consolidated Shares will be listed and quoted on the Main Market of Bursa Malaysia Securities Bhd on 24 January 2020*, being the next market day immediately after the Entitlement Date ('Listing Date'). A notice of allotment will be issued and despatched to the entitled shareholders for the Share consolidation at the addresses set out in the Record of Depositors within 4 market days after the Listing Date. (Emphasis added.)

[42] The information contained in the above Bursa Malaysia's announcement was also posted or published on the respondent's online platform, Kentrade, which was used by the appellant to buy and sell the ICON shares.

[43] Further, based on cl 10.23 of the 2 August 2019 terms and conditions (reproduced in para 5 above) the appellant is deemed to have received the said announcement on the respondent's Kentrade platform.

[44] In the circumstances, more than sufficient notice was given to the appellant regarding the ICON shares consolidation and he ought to have known about it even before the first overselling took place on 22 January 2020, well before Bursa Malaysia's announcement on its website since 9 January 2020 and also on the respondent's Kentrade platform since 14 January 2020.

[45] The appellant's complaint is that the remisier failed to inform him of the ICON shares consolidation, however, as stated earlier, this information was already in the public domain and in Kentrade *before* the first overselling was conducted by the appellant.

[46] Based on the appellant's own account of the facts, within about three hours *after* he informed the remisier of the first overselling (which took place around 9am) the remisier then informed him of the ICON shares

consolidation (around 11.52am). By then the first overselling had taken place and the loss *already incurred*. What the appellant did thereafter was to attempt to mitigate the loss which, as the appellant himself said, he did in a serious state of panic or in his own precise words, 'menyebabkan kepanikan saya yang serius atas insiden terlebih menjual saham ('short-selling') tersebut'.

[47] The fact is the first overselling which the appellant did on his own had caused him to panic and he now turns to fault the respondent for the decision he himself made causing the loss on the appellant's trading account.

[48] Again, the appellant only has himself to blame for this and it is both unreasonable and unfair for him to try to pass it on to the respondent.

The exclusion clause

[49] The respondent is under no duty to advise the appellant regarding any security which includes the ICON shares and the appellant's investment. This is provided for specifically under cll 4.16 and 4.20 of the 2 August 2019 terms and conditions which states as follows:

> 4.16 The Bank *makes no recommendation, advice or representation for any Securities or potential value of suitability of any transaction or investment strategy which are suitable for the Client's investment objectives, financial background and other particular needs*. The Client acknowledges that the *Client shall not in any event rely on any representation or advice by the Bank,its employees, CMSRLH, agents without the Client independently verifying the same and/or determining that the information is reasonable to be relied upon*. The Client acknowledges that instructions executed by the Bank are made at the Client's sole risk, and are accepted by the Bank on the basis that they constitute the Client's independent judgment. The Bank *shall not be liable for any losses suffered by the Client arising from* any execution of the Client's instructions and/or the C*lient's failure to exercise reasonable care and diligence*.
>
> 10.20 *The Bank does not, through the E-Services, recommend any investment nor does it offer any advice regarding the nature, potential value or suitability of any particular security, transaction or investment strategy*. The Client acknowledges that *all orders made by it through the E-Services and executed by the Bank pursuant thereto are made at the Client's sole and absolute risk*, and are accepted by the Bank *on the basis that they constitute the Client's own judgment arrived at independently*. (Emphasis added.)

[50] 'E-Services' is defined in the 2 August 2019 terms and conditions as:

> any of the functions and services provided by the Bank through Electronic Trading facilities, such as Ken Net, Ken Web, Ken Wealth, *KIBB Website* and *any other types and means of Electronic Trading facilities* and services that may be offered by the Bank to its Client from time to time, which shall include, without limitation, the following:

A

(i) the request, transmission, execution and confirmation of orders for the sale and purchase of securities (whether via telephone, facsimile transmission, Intranet, Internet, electronic mail or in writing);

(ii) on-line account status inquiries, account and order confirmation;

B

(iii) portfolio accounting services;

(iv) information services and price quotation services; and

(v) such other services which the Bank may provide to the Client from time to time. (Emphasis added.)

C

[51] 'Electronic Trading' and 'KIBB website' are defined in the 2 August 2019 terms and conditions as follows:

Electronic Trading means *trading in securities via the Bank's computer or telephonic services or systems, internet*, private network, personal computers, mobile telephones

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short messaging system and hand-held terminals;

KIBB Website means any of the *Bank's website(s)* which provides electronic trading facilities, online services or Information to the Client through such internet address(es) as may be designated by the Bank from time to time, including but not limited to *www.kentrade.com.my*. (Emphasis added.)

E

[52] Based on the above cll 4.16 and 4.20 of the 2 August 2019 terms and conditions, the respondent is not liable for executing any of the appellant's instructions as well orders made by the appellant though E-Services including

F

Kentrade.

[53] Pursuant to cl 4.20 the appellant had acknowledged that the orders or transactions he conducts through E-Services or Kentrade are done based on the appellant's own independent judgment.

G

[54] Therefore, notwithstanding that the transactions involving the ICON shares were the appellant own doing and that he further had sufficient notice of the ICON shares consolidation, cll 4.16 and 4.20 of the 2 August 2019 terms and conditions prevent the appellant from attaching any liability to the

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respondent regarding the appellant's transaction involving the ICON shares.

[55] Regarding the respondent's Kentrade platform, the appellant had no objection to the said platform nor did he object to the access given to him to use

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it. He further had no qualms using Kentrade and it would appear from the appellant's own averments in his affidavit in reply that he was proficient at using it.

[56] However, the appellant now complaints that Kentrade is unsafe and highly risky and alleged that the respondent was negligent in providing the Kentrade platform.

[57] Firstly, Kentrade is an online service which the appellant had agreed to cl 1.1 of the 2 August 2019 terms and conditions states:

> 1 AUTHORISATION
>
> 1.1 The Client hereby *irrevocably and unconditionally authorises* the Bank to *open and administer* the *Client's Accounts* as well as any other account(s)as the Bank may deemed fit for and on behalf of the Client to carry out the Client's instructions issued to the Bank on the terms and conditions set out below. (Emphasis added.)

[58] 'Client's account' is defined in the 2 August 2019 terms and conditions as:

> Client's Account or Client's Account(s) means the *account or account(s)* opened/maintained by the *Client for the purpose of trading in Securities* and includes any multiple trading account(s) and any and all account or accounts opened including CDS/securities account for and on behalf of the Client by the Bank. (Emphasis added.)

[59] Therefore, the opening of the appellant's trading account as well as Kentrade was expressly authorised by the appellant.

[60] Secondly, the appellant had used Kentrade to trade in the ICON shares. In the first overselling, the appellant had *already oversold* the ICON shares because he had failed to check or notice Bursa Malaysia's announcement as well as the announcement on Kentrade.

[61] Pursuant to cl 2.2 of the 2 August 2019 terms and conditions (stated in para 5 above) the appellant is deemed to accept the 2 August 2019 terms and conditions upon utilisation of the respondent's facilities or services which include the respondent's Kentrade platform.

[62] Thirdly, the ICON shares consolidation was announced on Kentrade and a further warning message was also posted on Kentrade.

[63] What bears repeating is that it is not the Kentrade platform or the respondent for that matter that caused the losses on the appellant's trading account but the appellant himself.

THE RESPONDENT'S RIGHT TO SELL THE SHARES IN THE APPELLANT'S TRADING ACCOUNT AND IMPOSE LATE PAYMENT INTEREST

[64] Whilst the issue of the respondent's right to sell the shares in the appellant's trading account and the imposition of late payment interest were not specifically raised in submissions advanced on behalf of the appellant, however, they were raised in his affidavit in reply. Therefore, for the purpose of completeness, I will address them.

[65] As the appellant had failed to make payment to the respondent for the outstanding amount in the appellant's trading account, the respondent is entitled to sell the shares therein and apply the net proceeds of the sale to settle all monies owed to the respondent. This is expressly provided for under cl 23.2.3 of the 2 August 2019 terms and conditions as stated in para 5 above.

[66] Similarly, the respondent's right to impose late payment interest as well as legal charges are provided for in the 2 August 2019 terms and conditions, specifically cll 30.2 and 30.3 as also stated in para 5 above.

[67] Even in the absence of the abovementioned clauses the law allows for interest and costs to be imposed on debts owed or outstanding sums. They do not by themselves constitute triable issues (*Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353; *Enco Systems Sdn Bhd v Soon Hin Hardware* [2009] 9 MLJ 535).

THE THIRD PARTY NOTICE/PROCEEDINGS (REMISIER)

[68] The appellant also raised the issue of a third party notice issued or the initiation of third party proceedings against the remisier which the appellant argued is tantamount to a triable issue that would defeat both the respondent's O 14 application as well as the respondent's O 18 application.

[69] It is trite that third party proceedings are regarded as separate and independent proceedings (*Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226).

[70] Therefore, the third party proceedings can be separated from the appellant's counterclaim as well as the respondent's claim and do not necessarily mean there is a triable issue which is the case in these appeals.

CONCLUSION

[71] Both the appellant's and respondent's submissions in respect of the appeals are substantially the same and are based on the same facts.

[72] The central issue in the appellant's defence and counterclaim is the allegation that the respondent was negligent. With respect, I am unable to agree with the appellant on this given, inter alia, that he acted on his own volition in the first overselling which led to the losses incurred in the appellant's trading account and the fact that the ICON shares consolidation was publicly announced.

[73] Thus, insofar as the Appeal 7 is concerned, the appellant has failed to satisfy the court why judgment should not be entered against him or that there is a triable issue, or that there ought for some other reason to be a trial (*National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283).

[74] It follows that the counterclaim, which is also premised on negligence, was bound to fail (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 3 CLJ 606) as it failed to disclose a reasonable cause of action or is frivolous, vexatious or otherwise an abuse of the process of court. The counterclaim is on the face of it is obviously unsustainable (*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; *Bandar Builder Sdn Bhd v United Malaysian Banking Corp Bhd* [1993] 3 MLJ 36).

[75] Therefore, the learned sessions court judge had not erred in allowing the respondent's O 14 and O 18 applications.

[76] Based on the reasons that I have set out above, I dismissed both the appeals and after hearing arguments on costs, granted costs of RM4,000 for Appeal 7 and RM4,000 for Appeal 8, both in favour of the respondent.

Appeals dismissed with costs.

Reported by Addibah Adnan